STATE OF MICHIGAN

IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
Judge Smolenski Presiding, and
Judges White and Kelly

DANIEL LEE STRAUB,

Plaintiff-Appellee,

v.

PHILLIP MICHAEL COLLETTE and **TERESA M. HEIL-WYLIE**, jointly and severally,

Defendants-Appellants.

Supreme Ct. No. 124757

Ct. of Appeals No. 236505

Lower Ct. No. 00-11405-NI

BRIEF ON APPEAL–APPELLANTS

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTION INVOLVED

I. Whether plaintiff had an actionable serious impairment of body function under MCL 500.3135(1) and (7), where he suffered finger injuries to his non-dominant hand in an automobile accident, but was able to walk and his finger injuries recovered fully following limited medical treatment?

Trial Court Answer: No.

Appellants' Answer: No.

Court of Appeals Answer: Yes.

Appellee's Answer: Yes.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

This is a third-party no-fault case. Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10) on the basis that the injuries to plaintiff's fingers on his left hand did not amount to a serious impairment of body function. MCL 500.3135(1) and (7). The trial court granted the motion for summary disposition. (2a-3a). Plaintiff appealed as of right. On December 20, 2002 the Michigan Court of Appeals issued an opinion reversing the trial court's order of summary disposition and remanding the case to the trial court for further proceedings. *Straub* v. *Collette*, 254 Mich App 454; 657 NW2d 178 (2002). (11a).

Defendants filed an application for leave to appeal. In lieu of granting leave to appeal, this Court entered an order on June 12, 2003 vacating the opinion of the Court of Appeals and remanding for consideration in light of this Court's April 9, 2003 order in *Kreiner* v. *Fischer*, 468 Mich 884; 661 NW2d 234 (2003). (15a). On September 16, 2003 the Court of Appeals issued an opinion on remand, again reversing the order of the trial court and finding that plaintiff's injuries met the serious impairment of body function threshold. *Straub* v. *Collette (On Remand)*, 258 Mich App 456; 670 NW2d 725 (2003). (16a).

Defendants sought leave to appeal. By order entered November 6, 2003, the Court granted leave to appeal and ordered that the case be argued and submitted together with *Kreiner* v. *Fischer*, Docket No. 124120. This Court's jurisdiction is based on MCR 7.301(A)(2).

STATEMENT OF FACTS

A. Factual Background.

Plaintiff was injured on September 19, 1999 when his motorcycle collided with an automobile. He broke a bone in the little finger of his non-dominant left hand and injured the tendons on the ring finger and long finger of his left hand. Plaintiff's dep., pp. 5, 38-39. (34a, 38a).[1] No treatment was required of the little finger. Outpatient surgery was done on September 23, 1999 to correct the injuries to plaintiff's tendons. Plaintiff's dep., pp. 38-39 (38a) and medical records (21a-24a). He was not hospitalized. Plaintiff's dep., p. 41. (39a). He attended two sessions of physical therapy and was given some exercises to do at home. *Id.*, p. 47. (40a). The last time plaintiff saw a doctor regarding this injury was November 23, 1999, about two months post-accident. *Id.*, p. 41 (39a) and medical records (28a). At that time plaintiff's doctor noted:

> "On examination today his wounds have healed nicely. He does have a slight Swan-necking of the long finger, but otherwise the wounds are maturing well. His fracture is nontender at the 5th metacarpal.
>
> "We obtained three [x-ray] views of the left hand. The fifth metacarpal fracture appears healed." (28a).

Plaintiff returned to work about two months after the accident, in the third week of November, 1999. Plaintiff's dep., pp. 41-42. (39a). He initially worked 20 to 25 hours per week and then returned to full-time employment without restrictions on

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[1]All of the evidentiary materials contained in the Appellants' Appendix were submitted to the trial court by plaintiff and/or defendants in connection with defendants' motion for summary disposition. See 1a, Record Nos. 23 and 25.

December 14, 1999. *Id.*, pp. 42-43 (39a) and medical records (28a). He has not missed work since that time. Plaintiff's dep., p. 43. (39a).

Although the broken finger did not require a cast or any treatment, plaintiff wore a cast for about one month to facilitate the healing of the ring finger and middle finger tendons. *Id.,* pp. 38-40. (38a). Plaintiff fully recovered from the injury, although he testified that he has about a 10 percent reduction in the grip strength of his left hand. *Id.,* pp. 44-45. (39a-40a). No medical evidence was offered to support that contention. Plaintiff testified that since returning to work full-time he has been able to perform all the duties of employment, albeit with some difficulty or discomfort, including lifting weights on a rope and helping to carry generators:

> "Q. And what do you find the 10 percent problem to be then?
>
> "A. Be strength, trying to grip, you know, picking up a glass of water is no problem but trying, you know, hook a 30 pound weight on a rope or trying to hold it in one hand it's hard to do.
>
> "Q. In spite of the fact it's difficult, are you still able to do it?
>
> "A. Yes.
>
> "Q. You're still able to carry out your duties at Shidler?
>
> "A. Yes. There is like heavier things like generators or something that takes two people to carry, I always just switch them, you know, I always make sure I grab with my right hand just because my left hand gets–I can grab it but it's uncomfortable.
>
> * * *
>
> "Q. Any other problem other than 10 percent reduction in your strength and grip-ability on your left hand?

"A. No." *Id.*, pp. 44-45. (39a-40a).

The only medication plaintiff took was Vicodan for about two weeks following the September 23, 1999 surgery. *Id.*, p. 45. (40a).

There are no activities that plaintiff can no longer engage in as a result of the injury. *Id.*, p. 47. (40a). He lives alone and does all of his own household and outdoor maintenance, including the maintenance of a 2-acre yard. *Id.*, p. 47. (40a). He repaired his own motorcycle after the accident. *Id.*, p. 48. (40a). At the time of the deposition he was planning to remodel his kitchen and repair the roof and install new soffits on his shop. He expected to do all the work himself. *Id.*, pp. 48-49. (40a-41a).

Plaintiff plays bass guitar for a band which performs at clubs on weekends. He did not play in the band from the time of the September 19, 1999 accident until mid-January, 2000 because of the injury to his hand. *Id.*, pp. 7-8, 43-44. (34a, 39a). As of January, 2000, he was able to resume playing the instrument and has been doing so ever since. *Id.*, p. 44. (39a).

Plaintiff filed an affidavit in opposition to the motion for summary disposition, indicating that from the time of the accident until late December, 1999 he was either unable to perform or had significant difficulty performing various household/yard chores without the use of his left hand, such as washing dishes, mowing the lawn, operating a weed-whacker and gardening. (43a). His affidavit also indicates that due to his hand injuries, in the fall of 1999 he was unable to operate his bow shop in which he would repair bows, make arrows for deer hunters and process deer meat. (44a).

B. Procedural Background.

The trial court granted summary disposition based on plaintiff's failure to establish a serious impairment of body function as required by the No-Fault Act. MCL 500.3135(1) and (7). (2a-3a). The Court of Appeals reversed in its December 20, 2002 opinion, finding that plaintiff's ability to work and to play bass guitar were "integral parts of his normal life" (13a), and since those abilities were affected, "albeit for a relatively limited time" (13a), the serious impairment of body function threshold as defined in MCL 500.3135(7) was met.

Defendants filed an application for leave to appeal. While the application was pending, this Court, on April 9, 2003, issued an order of remand in *Kreiner* v. *Fischer*, 468 Mich 984; 661 NW2d 234 (2003). (14a). On June 12, 2003 the Court entered an order remanding the present case to the Court of Appeals for consideration in light of the remand order in *Kreiner*. (15a).

On September 16, 2003 the Court of Appeal issued a published opinion on remand, again reversing the trial court's order granting summary disposition. (16a).

This Court granted defendants' application for leave to appeal by order entered November 6, 2003.

ARGUMENT

I. PLAINTIFF'S MINOR INJURIES TO HIS FINGERS ON HIS NON-DOMINANT HAND DO NOT MEET THE SERIOUS IMPAIRMENT OF BODY FUNCTION TORT THRESHOLD OF MCL 500.3135(1).

A. Summary of argument.

In 1995 P.A. 222, MCL 500.3135(7), the Legislature re-adopted the "general ability" to lead one's normal life test which had been the law under *Cassidy* v. *McGovern,* 415 Mich 483, 498-501; 330 NW2d 22 (1982). The *Cassidy* test was explained but overruled in *DiFranco* v. *Pickard*, 427 Mich 32; 398 NW2d 896 (1986). In the face of two clear choices, the Legislature in 1995 re-adopted the high threshold required by *Cassidy.* Both *Cassidy* and its progeny, including the explanation in *DiFranco*, provide guiding principles for interpretation of the "general ability to lead his or her normal life" test in MCL 500.3135(7).

In interpreting the "general ability" test, the Court should consider the no-fault act as a whole. The general abolition of the tort remedy for recovery of noneconomic loss was a legislative trade-off for the generous medical and wage loss benefits provided by the act without regard to fault. It is essential that the threshold for recovery of noneconomic loss be a high one in order to preserve the economic viability of the no-fault system, especially considering that making automobile insurance available at fair and equitable rates was raised to a constitutional requirement in *Shavers v. Attorney General*, 402 Mich 554; 267 NW2d 72 (1978). In 1995 P.A. 222, the Legislature clearly reaffirmed that the tort threshold must remain a high one.

Unfortunately, Court of Appeals decisions since the 1995 statute was enacted have eroded the "serious impairment of body function" test to the point where even minor injuries that cause a temporary loss of employment or short-term incursions on lifestyle meet the threshold. The Court of Appeals has erroneously treated temporary loss of employment as meeting the threshold, apparently extrapolating the statement in *Cassidy* that an injury need not be permanent to be serious to mean that a loss of employment need not be permanent to present a general inability to lead one's normal life. Contrary to the Court of Appeals' ruling, the "general ability" test requires the injury be so serious as to have a pervasive effect on the person's life as a whole, cutting across all or nearly all life's activities, consistent with the *DiFranco* synthesis that allows recovery only for very seriously injured plaintiffs–those who are bedridden, unable to care for themselves or are unable to eventually return to work. Temporary inability to work or to perform specific activities is insufficient; otherwise, the threshold would become essentially meaningless.

B. Standard of review.

An appellate court reviews the grant or denial of a motion for summary disposition *de novo*. *Spiek* v. *Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This case involves the interpretation of a statute, MCL 500.3135(7). Interpretation of a statute presents a question of law which is reviewed *de novo*.

C. The no-fault act's "serious impairment of body function" threshold.

The No-Fault Act provides that a person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance or use of a motor

vehicle, "only if the injured person suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1).

The term "serious impairment of body function" is defined in MCL 500.3135(7), added by 1995 P.A. 222:

> "As used in this section, 'serious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

Absent a material factual dispute as to the nature and extent of the plaintiff's injuries (which both parties agree does not exist in this case), the issue whether the plaintiff has suffered a serious impairment of body function is a question of law for the court. MCL 500.3135(2)(a). See also, *Kern* v. *Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000).

D. 1995 P.A. 222 legislatively adopted the standard from *Cassidy* v. *McGovern* as further defined in *DiFranco* v. *Pickard* to maintain the high tort threshold necessary to the integrity of the no-fault system.

The "serious impairment of body function" threshold for recovery of noneconomic damages has been part of Michigan's no-fault act since it first became law in 1973.[2] However, prior to the enactment of 1995 P.A. 222, the term was not defined by the Legislature. Two almost diametrically opposed opinions of this Court provided standards for determining whether a particular plaintiff had suffered a serious

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[2]The threshold for recovery of noneconomic damages is, of course, a legislative trade-off for the assured recovery of economic losses such as medical expenses and wage losses. For a summary of the no-fault act's basic features, see *Cassidy* v. [redacted]

impairment of body function. *Cassidy* v. *McGovern,* 415 Mich 483, and *DiFranco* v. *Pickard*, 427 Mich 32.

The Court in *Cassidy* held that whether there is a serious impairment of body function is a question of law absent a material factual dispute concerning the nature or extent of the plaintiff's injuries. The Court also held that "serious impairment of body function" requires impairment of an important body function and that to meet the threshold the impairment must be so serious as to affect the person's general ability to live a normal life.[3]

The *Cassidy* test and resulting body of case law shaping the test was fully defined and explained in *DiFranco v Pickard*, 427 Mich 32, 62-67, but the *DiFranco* Court disavowed it as not reflecting legislative intent. Rather, *DiFranco* held that the impairment need not be of an important body function. 427 Mich 32, 39. However, in 1995 P.A. 222 the Legislature overruled *DiFranco* and reinstated the *Cassidy* test[4] requiring not only an impairment of an important body function, but also that it be objectively manifested, and affect the plaintiff's general ability to lead his or her normal life. MCL 500.3135(7).

The Court of Appeals has recognized at times that 1995 P.A. 222 was intended to reinstate the law as it existed under *Cassidy,* and therefore *Cassidy* and its progeny,

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[3]It also required an objectively manifested injury, an element not at issue in this case.

[4]1995 P.A. 222 contains only a slight variation in the language from *Cassidy.* Whereas *Cassidy* had required an impairment of an important body function that is so serious as to affect the person's general ability to live a normal life, the statute refers to the person's general ability to lead "his or her normal life". The significance of this slight variation in the language, if any, is discussed later in this brief.

including the explanation of *Cassidy* in *DiFranco,* constitutes the present law of this state as to whether a serious impairment of body function exists. *Jackson v. Nelson*, 252 Mich App 643, 649-650; 654 NW2d 604 (2002). See also, *Kern v. Blethen-Coluni*, 240 Mich App 333, 340-341, in which the Court found the legislative analysis supporting 1995 P.A. 222 "not only repeats the *Cassidy* standards, it also emphasizes them." See House Legislative Analysis, House Bill 4341 as enrolled Public Act 222 of 1995, Second Analysis (12-18-95). (45a).[5] The standard defined in MCL 500.3135(7) is "[c]onsistent with" the standards established in *Cassidy. Id.* See also, *Miller v. Purcell*, 246 Mich App 244, 249; 631 NW2d 760 (2001), citing *Kern* for the same proposition. As noted in *Kern*, 240 Mich App 333, 338, by enacting 1995 P.A. 222, the Legislature overturned this Court's decision in *DiFranco*.

DiFranco is the most important point of reference because it collected the cases decided under the tort threshold injury standards of *Cassidy*. *DiFranco* fully explained the effect then overruled them. The Legislature chose to adopt both the important body function requirement and the "general ability to lead [one's] normal life" test *DiFranco* had defined but decried. The Legislative intent, however, is clear to have that be the test. "[W]here legislation has been authoritatively construed by the courts, then retained by the Legislature, we will find legislative concurrence." *Rogers v City of Detroit*, 457 Mich 125, 140; 579 NW2d 840 (1998), overruled on other grounds, *Robinson v City of Detroit,* 462 Mich 439; 613 NW2d 307 (2000), citing *Magreta v*

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[5]Although a legislative analysis is not controlling on the question of legislative intent, it is important in this case because it confirms that 1995 P.A. 222 was an express re-adoption of the *Cassidy* test.

Ambassador Steel Co, 380 Mich 513, 520; 158 NW2d 473 (1968). That principle is doubly applicable here. MCL 500.3135 was authoritatively construed in *Cassidy*, then a body of case law developed under that construction. This Court again authoritatively construed the legislation first by defining exactly what the *Cassidy* standard meant in practice and changing it; then the Legislature adopted the first authoritative construction in the face of two clear choices.

It must be recognized that the Legislature's intent is clearly to maintain a high tort threshold for auto accident claimants that will result in most injuries not being compensable in a tort system, and will also result in minimizing litigation. As this Court recognized in *Cassidy, supra:*

> "At least two reasons are evident concerning why the Legislature limited recovery for noneconomic loss, both of which relate to the economic viability of the system. First, there was the problem of the overcompensation of minor injuries. Second, there were the problems incident to the excessive litigation of motor vehicle accident cases. Regarding the second problem, if noneconomic losses were always to be a matter subject to adjudication under the act, the goal of reducing motor vehicle accident litigation would be illusory. The combination of the costs of continuing litigation and continuing overcompensation for minor injuries could easily threaten the economic viability, or at least desirability, of providing so many benefits without regard to fault. **If every case is subject to the potential of litigation on the question of noneconomic loss, for which recovery is still predicated on negligence, perhaps little has been gained by granting benefits for economic loss without regard to fault.**" (Emphasis added), 415 Mich 483, 500.

The economic aspects of auto accident reparations was addressed by this Court even before *Cassidy.* The no fault act was constitutionally challenged and resulted in the June, 1978 decision in *Shavers v. Attorney General*, 402 Mich 554. The importance

of *Shavers* to the instant case is that it raised to a constitutional level, as a due process right, the availability of no fault insurance at fair and equitable rates:

> "In choosing to make no-fault insurance compulsory for all motorists, the Legislature has made the registration and operation of a motor vehicle inexorably dependent on **whether no-fault insurance is available at fair and equitable rates**. Consequently due process protection under the Michigan and United States Constitutions (Const. 1963, Art. 1, § 17; U.S. Const, Am XIV) are operative.
>
> ***
>
> We therefore conclude that Michigan motorists are constitutionally entitled to have no-fault insurance made available on a fair and equitable basis. The availability of no-fault insurance and the no-fault insurance rate regulatory scheme are, accordingly, subject to due process scrutiny. 402 Mich 554, 559, 600." (Emphasis added).

Finding a constitutional deficiency with regard to rates, this Court gave the Legislature 18 months to cure the deficiency and then approved the curative act in *Shavers v Attorney General,* 412 Mich 1105; 315 NW2d 130 (1982). The amendatory legislation correcting the deficiency with regard to rate-setting found in the 1978 *Shavers* opinion is the so-called Essential Insurance Act, 1979 P.A. 145. The standards for rates are set forth in MCL 500.2109, and the effect of this statute is to require a direct correlation between costs and rates that are charged. Thus, a rate cannot be excessive, meaning, "unreasonably high for the insurance coverage provided and a reasonable degree of competition does not exist for the insurance to which the rate is applicable."[6] Nor can a rate be inadequate, meaning "unreasonably low for the insurance coverage provided and the continued use of the rate endangers the solvency

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[6]MCL 500.2109(1)(a)

"use of the rate has or will have the effect of destroying competition among insurers, creating a monopoly, or causing a kind of insurance to be unavailable to a significant number of applicants".[7] Also, rates may not be unfairly discriminatory. The prohibition against discriminatory rates requires rate correlation to cost input, since it states:

> "A rate for a coverage is unfairly discriminatory in relation to another rate for the same coverage if the differential between the rates is not reasonably justified by differences in **losses, expenses, or both**, or by differences in the uncertainty of loss, for the individuals or risks to which the rates apply. A reasonable justification shall be supported by a reasonable classification system; by sound actuarial principles when applicable; and by actual and credible loss and expense statistics or, **in the case of new coverages and classifications, by reasonably anticipated loss and expense experience**. A rate is not unfairly discriminatory because it reflects differences in expenses for individuals or risks with similar anticipated losses, or because it reflects differences for losses for individuals or risks with similar expenses." (Emphasis added). MCL 500.2109(1)(c).

Consistent with these statutory requirements that emanated from this Court's constitutional review of the no fault act, it is noteworthy here that the Legislature has expressly chosen to maintain the high tort threshold of *Cassidy,* in 1995 P.A. 222, and that the economic viability *Cassidy* identified dovetails with the concern for the rate paying public which this Court raised to a constitutional level in *Shavers.* Moreover, the fact that auto accident reparation has been changed to prioritize payments of first-party benefits of medical and wage losses without fault, should well guide the Court to do its part in maintaining a high tort threshold, since the tradeoff for "the abolition of the tort

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[7]MCL 500.2109(b)

remedy for personal injury resulting from motor vehicle accidents was clearly justified by deficiencies in the tort system." *Shavers,* 402 Mich 554, 621.

To the extent a given claimant makes no tort recovery (while having all medical and most wage losses compensated unless disqualified because uninsured), he or she merely joins the majority of pre-no-fault tort victims who made no recovery, even if seriously injured. Please see *Shavers,* 402 Mich 554, 621 n46 ("only 37% of persons injured in automobile accidents in Michigan received tort recovery."); n47 ("His testimony showed that for cases of serious injuries under the tort system, 56.7% of the persons received no compensation; 11.1% received less than 50% of the economic loss, and 10.9% received 50% to 100% of economic loss. The balance of 20.3% received anywhere from 100% to 400% of economic loss.") The rationale for sustaining no-fault statute against the Due Process challenge was that an abolition of tort remedy in favor of first party benefits without regard to fault was rationally related to an uncertainty of tort remedies anyway. But obviously there is no "free lunch" in the system. The tort threshold essential to the abolition of tort remedy must be maintained at a high level to have the system work. After all, "Michigan motorists are constitutionally entitled to have no-fault insurance made available on a fair and equitable basis." *Id,* 402 Mich 554, 600. The economic viability requisite to the system can only be met by fulfilling the underlying premise that there is an abolition of the tort remedy for minor injuries.

Unquestionably, the Legislature has reaffirmed that the tort threshold is to remain a high one in light of the 1995 legislation. It had before it *DiFranco* and its interpretation of *Cassidy* and its Court of Appeals progeny. The Legislature is

presumed to have been aware of that case law. See, e.g., *Michigan Gas Storage Co v Gregory,* 341 Mich 34, 37; 67 NW2d 219 (1954) ("[W]e must presume that the legislature had in mind the decisions of this Court ...."); *Jeruzal v Herrick,* 350 Mich 527, 534; 87 NW2d 122 (1957) ("The legislature is presumed to have known of the judicial decisions of this Court....").

Despite the *DiFranco* Court's criticisms of *Cassidy,* the Legislature, with full knowledge of those criticisms, chose the *Cassidy* test. Since the amendments to the no-fault act in 1995 P.A. 222 returned the determination of a threshold injury to the law as it existed under *Cassidy* and subsequent cases that had developed the "important body function" and "general ability to lead a normal life" tests, that decision and its progeny as characterized by *DiFranco* should remain controlling in applying the definition of "serious impairment of body function" in MCL 500.3135(7). See *Kern, supra* at 339, 342, citing *Burk* v. *Warren (After Remand),* 137 Mich App 715; 359 NW2d 541 (1984), a case decided under *Cassidy.*

Defendants urge this Court to restore the test as defined in *Cassidy* and *DiFranco.*

E. The Court of Appeals has eroded the "general ability" test such that, contrary to *Cassidy* as explained in *DiFranco*, only a temporary loss of employment from minor injuries or short-term, minor incursions on lifestyle are sufficient to meet the threshold.

Both *Cassidy* and the legislative analysis of 1995 P.A. 222 indicate that a goal of the "general ability" test is to further uniformity and predictability in the law. See *Kern* v. *Blethen-Coluni,* 240 Mich App 333, 338-339. Unfortunately, while the Court of Appeals has sometimes acknowledged that the 1995 amendment was intended to reinstate the

law as it existed under *Cassidy,* in many opinions, including the case at bar, the Court of Appeals has eroded the "general ability" test to the point that any minor injury with temporary loss of work and some incursions on lifestyle activities is a threshold injury.

This erosion of the tort threshold has resulted from repeated erroneous application of a number of principles. First, the Court of Appeals has incorrectly failed to focus on whether the impairment of an important body function affects the person's general ability to lead his or her normal life, focusing instead on particular activities such as employment or specific lifestyle activities. As will be discussed, the term "general" is a touchstone of the test which requires a court to consider the effect of the impairment on all aspects of the person's life, considered as a whole, not merely the ability to perform particular activities. The "general ability" portion of the statute is effectively being rewritten by the Court of Appeals as simply an incursion on the "ability", sans "general", to lead a normal life.

Second, the Court of Appeals has failed to recognize that MCL 500.3135(7) adopted a unified definition of "serious impairment of body function," not just a checklist of separate and independent elements. To fulfill the Legislature's intent to establish a significant obstacle to recovery of noneconomic damages, the definition must be considered as a whole, starting with the recognition that not all body functions are important body functions.

Third, the Court has misapplied the rule from *Cassidy* that an impairment of body function need not be permanent to be serious, incorrectly converting it into a rule that a short-term loss of employment or short-term limitation on lifestyle is sufficient.

Fourth, the Court of Appeals has failed to give effect to the requirement that there be an important body function impaired. These are discussed below in the context of the Court of Appeals opinions in the case at bar.

1. The Court of Appeals opinions.

The original opinion of the Court of Appeals focused on the fact that plaintiff's hand injury kept him from playing the guitar for about four months. The holding in that opinion is quoted below:

> "In this case plaintiff, who, based on undisputed evidence, had regularly performed as a musician playing the bass guitar, was unable to do so for about four months as a result of the injuries that he suffered in the accident. Given plaintiff's undisputed deposition testimony that he performed in a band that gave performances roughly every weekend and additionally practiced about three or four times a week, being able to play the bass guitar was a major part of plaintiff's normal life. See *Kreiner, supra* at 518-519 (considering evidence that the plaintiff in that case was limited in time he could work and unable to participate in 'certain types of recreational hunting' as supporting a conclusion that he suffered a serious impairment of body function). In deciding whether injuries constitute a serious impairment of body function, it is appropriate to compare a plaintiff's 'lifestyle before and after the accident.' *May* v. *Sommerfield (After Remand),* 240 Mich App 504, 506; 617 NW2d 920 (2000). It is also important to bear in mind that the plain language of MCL 500.3135(7) provides a 'subjective' definition in that the determination centers on the effect on the particular injured party's normal life, see *May, supra,* as opposed to the typical effect of injuries of a certain type on people generally. Applying these principles to the present case, **we conclude that plaintiff's injuries constituted a serious impairment of body function because, albeit for a relatively limited time, they did affect his general ability to lead his normal life, particularly his ability to perform musically and to work which were integral parts of his normal life.** [Citation omitted.] It is immaterial that the same injuries suffered by a

> hypothetical person who led a more sedentary lifestyle than plaintiff or who did not rely on the use of the person's non-dominant hand as much as plaintiff did might not constitute a serious impairment of body function." (Emphasis added). (12a-13a).

That is directly contrary to this Court's synthesis of the "general ability to live a normal life" test in *DiFranco*, where the Court recognized that under this test, that even a permanent loss of dexterity in the little finger of a violinist would not meet the tort threshold. 427 Mich 32, 65-66. Finger injuries simply do not suffice.

On remand, the Court of Appeals reiterated its first opinion but stated plaintiff's time off from his employment as a cable lineman and the short-term inability to perform household/yard chores and to process deer meat established that the injuries had affected plaintiff's general ability to lead his normal life. While in the first opinion the Court had focused primarily on plaintiff's four-month inability to play guitar in a band, in the opinion on remand the Court said the guitar playing was only one factor in the decision, and the Court emphasized the loss of employment, citing *Kreiner* v. *Fischer (On Remand)*, 256 Mich App 680; 671 NW2d 95 (2003):

> "But it [guitar playing] is a factor in our determination in this case because of its significance in plaintiff's life. Although plaintiff had a 'day' job, playing in the band was no less an integral part of plaintiff's life. As this Court stated in *Kreiner (On Remand), supra* at 688, 'Employment or one's livelihood, for a vast majority of people, constitutes an extremely important and major part of a person's life. Whether it be wrong or right, our worth as individuals in society is often measured by our employment.' As the *Kreiner* Court also recognized, 'injuries affecting the ability to work, by their very nature, often place physical limitations on numerous aspects of a person's life.' *Id.* at 689. We are not suggesting that any injury sustained from a motor vehicle collision that results in the plaintiff losing the ability to work

> constitutes 'serious impairment of body function.' But we are cognizant of the reality, as was this Court in *Kreiner (On Remand), supra*, that such an injury, 'under the right factual circumstances, can be equated to affecting a person's *general* ability to lead his or her normal life.' *Id.* At 688; emphasis in original. We find these circumstances exist here." (18a-19a).

Although the "loss" of employment for plaintiff Straub was of short duration, the Court of Appeals on remand relied on the proposition from *Kern* v. *Blethen-Coluni*, 240 Mich App 333, 343, citing *Cassidy*, 415 Mich 483, 505, that "an injury does not need to be permanent in order to constitute a serious impairment of body function." (18a).

2. The "general ability" test requires perversive impact on the whole of a plaintiff's life, not just particular activities.

The test established by *Cassidy,* explained by *DiFranco*, and subsequently adopted in MCL 500.3135(7), contains at least three descriptive words or phrases which, taken together, define the high threshold established by MCL 500.3135(1): The impairment must be of an important body function; it must be a serious impairment, and; the impairment must be so serious as to affect the person's general ability to live a normal life. In interpreting a statute, the language must be considered as a whole. Words and phrases must be assigned meanings as are in harmony with the whole of the statute. *Sweatt* v. *Dep't of Corrections*, 468 Mich 172, 179-180; 661 NW2d 201 (2003). As held by this Court in *Cassidy*, "serious impairment of body function" is a significant obstacle to recovery and must be read in the context of the other significant thresholds:

> "In determining the seriousness of the injury required for a 'serious impairment of body function', this threshold should be considered in conjunction with the other threshold

> requirements for a tort action for noneconomic loss, namely, death and permanent serious disfigurement. M.C.L. 500.3135; MSA 24.13135. The Legislature clearly did not intend to erect two significant obstacles to a tort action for noneconomic loss and one quite insignificant obstacle." 415 Mich 483, 503.

See also, *Jackson* v. *Nelson*, 252 Mich App 643, 653-654.

The fact that employment or household or other tasks may be an "integral" part of the person's usual activities does not meet the test, because it does not address whether the person's general ability to live his normal life, in keeping with the *DiFranco* synthesis, has been significantly affected.

The Court of Appeals is reading the word "general" in this context more like "any", instead of the *DiFranco* acknowledged meaning–bedridden, unable to care for themselves, unable to eventually return to work. 427 Mich 32, 64. These are pervasive results, affecting most if not all life activities, and certainly not satisfied by mere particular activities and avocations that are restricted but with a continuing general ability to lead a normal life. The essential a court should test for as "general ability"–as part of the whole of a plaintiff's life–is this pervasiveness, not just the inability to work or perform specific tasks or engage in particular activities. "General" requires a pervasive effect across a broad range of life activities. See *The American Heritage Dictionary of the English Language*, p. 548, defining the term "general" as: "1. Relating to, concerned with or applicable to the whole, or <u>every member of a class or category</u>." (Emphasis added). Instead of requiring "every", the Court below has erroneously looked for any incursion on lifestyle, and if coupled with a minor but objective injury and

temporary loss of work (a preeminent consideration according to the Court of Appeals because work is the usual activity of most people), incorrectly found a threshold injury.

3. Loss of work is erroneously being treated as a primary determinant of the tort threshold, but with inconsistent results.

The Court of Appeals opinion on remand is erroneous and adds to the confusion and inconsistency, since the Court placed great emphasis on what is merely a short-term loss of employment from the finger injury as sufficing to meet the "general ability" test. (16a). That holding was based on an apparent extrapolation from the statement in *Cassidy* that an injury need not be permanent to be serious, 415 Mich 483, 505, to mean that a loss of employment need not be permanent to present a general inability to lead a normal life.

In *Cassidy*, this Court rejected the idea that mere temporary loss of employment relates to an injury not needing to be permanent to be serious, since the *Cassidy* test was clearly not tied to employment: "This conclusion [that walking was an important body function] is not affected one way or another by the fact that Leo Cassidy is a potato farmer who must be on his feet for long hours." 415 Mich 483, 505. Thus, employment, which of course affects most people, was not the touchstone; rather, it was the inability to walk for over seven months–such inability being a pervasive problem affecting all or nearly all aspects of living a normal life. Missing some work is not the test, no matter how important work is to a particular person, or the tort threshold will be meaningless.

As stated in *DiFranco*, explaining the "general ability to lead a normal life" test: "If the plaintiff can perform common day-to-day activities, albeit with some difficulty, or can eventually return to work, the plaintiff is usually not deemed to have suffered a serious impairment of body function." 427 Mich 32, 64. (Emphasis added). Going on, the Court explained that under this test, "Apparently, only plaintiffs who are bedridden, cannot care for themselves, or are unable to perform any type of work can satisfy this test." 427 Mich 32, 66. This reflects the pervasiveness of an important body function being impaired that relates directly to the "general ability" test this Court clearly described then rejected in *DiFranco*, but the Legislature in response re-adopted in 1995 P.A. 222.

In contravention of the *DiFranco* standards and the specific reference to work in *Cassidy* not affecting the analysis, the Court of Appeals has given preeminence to temporary inability to work and minor lifestyle incursions to find a threshold injury for truly minor injuries that are negligible in comparison to the *DiFranco* examples. In the opinion on remand, the Court of Appeals ruled that plaintiff Straub's employment was an important part of his life and therefore the inability to work, albeit for a short period of time, affected his general ability to lead his normal life. The Court adopted the holding from *Kreiner* v. *Fischer (On Remand),* 256 Mich App 680, 688; 671 NW2d 93 (2003), that, "such an injury, 'under the right circumstances, can be equated to affecting a person's *general* ability to lead his or her normal life.'" (19a). The Court said temporary inability to work would not automatically meet the threshold, but offered no guidance as to what factors will affect the outcome or why in this case the temporary loss of

employment was sufficient whereas in other cases it was not. Also, it ignored the fact that in *DiFranco* the eventual return to work was said to not meet the threshold of general ability to lead a normal life, notwithstanding that defendants had briefed this point on remand.

The idea that temporary inability to work following an accident meets the threshold because an injury need not be permanent to be serious is inconsistent with *Cassidy* as explained in *DiFranco,* 427 Mich 32, 64, which held that a plaintiff who can "eventually return to work" or can perform common day-to-day activities, albeit with some difficulty, does not meet the threshold. Yet, that is apparently lost on lower courts in cases like the instant one, apparently because of the confusion of an injury needing not to be permanent to be serious, tacitly transmogrified into employment loss needing not be permanent to be a loss of general ability to lead a normal life.

On the other hand, the Court of Appeals has not been consistent on loss of work and many cases are inconsistent with the instant case. Numerous cases decided under MCL 500.3135(7) involved plaintiffs who missed some time from work as a result of their injuries, and indeed some with even more lost work. In the *Hermann v Haney* case that was the companion case in *Cassidy,* the plaintiff missed one month of work (see 415 Mich 483, 489) and was held to not have a threshold injury, so the idea that missing work portends a threshold injury because work is important to most people and an injury does not have to be permanent to be serious is simply in error.

Inconsistent with the instant case, the Court of Appeals has sometimes found that temporary time off work and temporary inability to perform some specific tasks is

not sufficient to meet the threshold. For example, on September 16, 2003, the same day the opinion on remand in the case at bar was issued, the Court of Appeals issued two other decisions affirming summary disposition in favor of the defendants on the basis of no serious impairment of body function, one with twice as much work loss. In *Rosloniec* v. *Brouilette,* Docket No. 24025 (49a), the plaintiff suffered injuries to his neck, back and shoulder, and as a result was off work from the date of the accident on February 12, 1998 until he returned to full-time employment on October 21, 1998, a period of more than eight months, double the work loss for Mr. Straub. The Court of Appeals upheld summary disposition in favor of the defendant, and rightly so, on the basis that the plaintiff was eventually able to engage in employment and the other activities that he did prior to the accident, fully consistent with *DiFranco, supra.*

Similarly, in *Sanders* v. *Cantin,* Docket No. 240065 (52a), the plaintiff incurred a "boxer's fracture" of his left hand and was off work for six weeks. The Court correctly found loss of employment and a short-term inability to perform daily activities did not meet the threshold:

> "Even though plaintiff was off work for six weeks, he was able to perform normal household duties within two weeks. His record of treatment was not extraordinary, and the healing process lacked any substantial complications leading to a disruption of his normal life. Despite having a permanent scar, plaintiff has an excellent prognosis for recovery."

Thus, sometimes the Court of Appeals features temporary loss of work as important (usually with the erroneous application of the principle that an injury does not have to permanent to be serious), yet in others the eventual return to work is properly recognized as defeating a threshold argument.

In *Hermann* v. *Haney*, *supra*, the plaintiff's injuries caused her to miss work for one month. Her limitations from her injuries diminished after that month and resolved after two months. This Court found the injuries did not amount to serious impairment of body function and noted that, "Wage loss was compensated under no-fault economic provisions." 415 Mich 483, 503. This point adds guidance both on not meeting the threshold, and, the proper role of work loss as bearing on the tort threshold.

4. Eventual return to work within 3 years allows a statute-based bright line test for loss of work as a factor on general ability to lead a normal life.

The reference to recovery of work loss as a no-fault benefit in *Hermann* is important and offers the Court a possible means to establish either a bright line rule or at least a framework for decision that would guide lower courts on lost employment as bearing on general ability to lead a normal life. Under the no-fault act work loss is paid as a benefit for a period of three years. MCL 500.3107(1)(b). Thus, the three-year point is a statute-based milestone of importance.

More importantly, if a person suffers work loss as the result of a motor vehicle accident for a period of more than three years, he or she may recover in tort for work loss incurred beyond the three-year period. MCL 500.3135(3)(c). That provision relates directly to MCL. 500.3135(1) and (7) because it deals with the circumstances under which a person who has been injured in a motor vehicle accident may avoid the no-fault act's general bar of tort recovery. The Legislature has already determined that a person who has been off work for a period of three years has suffered an injury so significant as to allow recovery in tort for additional work loss beyond the period

compensated by no-fault PIP benefits. It is therefore inconsistent to say that work loss for a lesser period should be compensated indirectly as a factor bearing on general ability to lead a normal life for non-economic damages. After all, tort liability is "abolished" generally in MCL 500.3135(3), except as provided in MCL 500.3135(3)(a) to (d), and work loss is not an exception until 3 years after an accident.

These two provisions on work loss thus give important statute-based guidance on employment loss as it relates to considering general ability to lead a normal life. When it is considered that *Cassidy* had indicated employment is irrelevant to impairment of an important body function, 415 Mich 483, 505, and, *DiFranco's* synthesis of post-*Cassidy* cases had said an eventual return to work would not present a serious impairment under the *Cassidy* general ability to lead a normal life test, defendants submit the legislative adoption of that test in 1995 P.A. 222 would correlate with 3 years as a bright line test for loss of work as a factor in the general ability to lead a plaintiff's normal life. Or, viewed differently, the meaning of "general ability to lead a normal life," as it relates to work loss, is given clarified meaning by the related statutes. *Accord*, *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) ("In considering the statute at issue, we consider both the plain meaning of the critical word or phrase as well as its 'placement and purpose in the statutory scheme.'"); *G C Timmis Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) ("[W]e apply *noscitur a sociis* to the individual phrases...as well as to the other provisions...because the emphasized language does not stand alone, and thus it cannot be read in a vacuum.")

A person such as plaintiff Straub who eventually returns to work in two months should not be viewed as having the general ability to lead his normal life sufficiently affected by loss of employment to have this be a relevant factor on the tort threshold, let alone a preeminent factor. This is not to say the threshold cannot be met unless the plaintiff incurs a work loss of at least three years (a person who is rendered unable to walk for 7 months meets the threshold under *Cassidy*). However, if loss of employment is considered as a factor in the "general ability" test, it should at least be after the three-year point in light of MCL 500.3135(3)(c) and MCL 500.3107(1)(b).

F. If the statutory definition calls for a subjective inquiry, the result is the same because the "general ability" test, in conjunction with the requirement of an important body function being impaired, still should require a pervasive effect on most if not all aspects of the plaintiff's life, not merely temporary loss of employment or other incursions on particular lifestyle activities.

MCL 500.3135(7) uses the words "his or her normal life" whereas the formulation in *Cassidy* was "general ability to live a normal life." Plaintiff has asserted this is a material change in the test.[8] In the first place, this Court's formulation in *Cassidy* linked objective inquiry of an important body function with "the person's general ability to live a

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[8]Court of Appeals decisions on the issue whether the "serious impairment of body function" inquiry is subjective appear to be in conflict. In *May* v. *Sommerfield,* 240 Mich App 504, 506; 617 NW2d 920 (2000), *Kreiner* v. *Fischer,* 251 Mich App 513, 518, n5; 651 NW2d 433 (2002), vacated and remanded 468 Mich 884; 661 NW2d 234 (2003), opinion on remand 256 Mich App 680; 671 NW2d 95 (2003), and in this case the Court said it is a subjective test. However, in *Kern*, 240 Mich App 333, 340, n2, the Court of Appeals, citing *Cassidy,* 415 Mich 483, 505, held that an "important body function" means a function of the body that affects the person's general ability to live a normal life, and in footnote 2 quoted *Cassidy* to explain that this determination "'is not affected one way or another by the fact that Leo Cassidy is a potato farmer who must be on his feet for long hours. We believe that the Legislature intended an objective standard that looks to the effect of an injury on the person's general ability to live a normal life.'" This reference in *Kern* suggests the inquiry is not subjective.

normal life", 415 Mich 483, 505, so a particular plaintiff's condition was considered, but in the context of important body functions and the general ability requirement. Thus, the significance of the variation in the language is at best minimal. Second, the Court of Appeals has used those phrases interchangeably, which calls into question whether the Legislature did, in fact, intend to depart (even partially) from *Cassidy* by using the phrase "his or her normal life" as opposed to "a normal life". According to *Kern, supra*, the answer should be no. "[T]he Legislature has returned to the standards of *Cassidy*." 240 Mich App 333, 342.

This Court's discussion of Leo Cassidy's injuries provides particular insight in the present case. Mr. Cassidy suffered complete breaks of both bones in his lower right leg, was hospitalized for 18 days, wore four casts for the next seven months, and continued to suffer ill effects from the injury one and one-half years later. 415 Mich 483, 504. This Court said:

> "Walking is an important body function that for Leo Cassidy was impaired by his broken bones. This conclusion is not affected one way or another by the fact that Leo Cassidy is a potato farmer who must be on his feet for long hours. We believe that the Legislature intended an objective standard that looks to the effect of an injury on the person's general ability to live a normal life. Walking is an important body function, the serious impairment of which constitutes the 'serious impairment of body function.'" 415 Mich 483, 505.

This reasoning follows directly from the requirements, subsequently adopted by the Legislature in 1995 P.A. 222, that the injury must present an important body function to begin with, and must have interfered with the plaintiff's "general ability" to live his normal life. The ability to walk is a significant part of the normal life activities of the vast majority of people, and an inability to walk will pervasively affect most if not all

day to day activities and hence the general ability to lead a normal life. A significant, long-term interference with the ability to walk, as suffered by Mr. Cassidy, impaired his ability to live his normal life, regardless of whether his employment required him to be on his feet for long periods or whether he lived a sedentary lifestyle.

On the other hand, *Cassidy* clearly rejected the position that impairment of "any body function" would meet the threshold, even if not an important function, and cited as an example "use of the little finger". 415 Mich 483, 504. Thus, plaintiff's finger injuries cannot meet the threshold since the legislation has returned to the *Cassidy* standards.

As discussed above, the "general ability" test requires the court to consider the impairment of an important body function that affects the person's general ability to live a normal life pervasively and as a whole, taking into account all aspects of the person's life. Given the "general ability" standard as described in *DiFranco*, in this case and in most cases a subjective inquiry will not affect the outcome.

G. As a whole, plaintiff does not meet the threshold.

In this case plaintiff clearly did not meet the serious impairment threshold. His injuries were limited to three fingers on his left hand. If finger injuries suffice for an important body function, it raises the question, what is an unimportant body function, since the use of "important" in the Act surely invites a comparison of important to unimportant body functions.[9] While it may be difficult to pick and choose certain body functions as unimportant, either because of an inherent tendency to put one's self in the

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[9] *Cf. McKenzie v Auto Club Insurance Association,* 458 Mich 214, 219; 580 NW2d 424 (1998) (use of comparison term "use of a motor vehicle as a motor vehicle" invited comparison of uses for other purposes).

position of the claimant or because body parts are all connected, clearly that is the comparison-inviting term used in *Cassidy* and adopted by the Legislature in 1995 P.A. 222. If the term "important body function" is glossed over as always present, the sense of the statute to give meaning to "serious impairments" will negate the serious element.

No published case has been found after 1995 P.A. 222 in which a court has held that a body function is not important, and, usually courts do not address the issue when ruling for a defendant, preferring to find there is not the requisite seriousness and affect on the general ability to lead a normal life rather than holding that certain body functions are not important.[10] Still, the impairment of an "important body function" is an independent requirement in the definition in MCL 500.3135(7). And, the guidance of this Court in *Cassidy* is that an impaired ability to walk (for seven months) is an important body function whereas in the companion case of *Hermann,* the indications are that temporary loss of consciousness followed by post-accident back and neck pain do not meet the threshold, yet the Court did not address whether she suffered an impairment of an important body function (saying there was a question whether she had suffered any impairment of body function) and instead decided that case on the lack of seriousness. 415 Mich 483, 504. This Court had contrasted the important body function with a finger in *Cassidy,* implicitly not an important body function. *Id.* Likewise, in *DiFranco,* this Court suggested that under the *Cassidy* test a violinist with leg injuries

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[10]See, e.g., *Blatt v Lynn,* Mich App Per Curiam, 1999 WL 33441163, (No. 209686, June 22, 1999) ("Assuming, arguendo, that the injuries to plaintiff's neck, back, shoulder, and psyche impair important body functions, plaintiff fails to meet the other components of the statute; the injuries have had a negligible effect on his ability to lead a normal life.")

and confined to a wheelchair should meet the threshold but an injury to the violinist's little finger and hand, would not because "the 'serious impairment of body function' threshold bars recovery of non-economic damages for minor injuries, regardless of how seriously the injury affects a particular person's life." 427 Mich 32, 65-66. These examples suggest that the impaired function must be substantial, like walking, that will pervasively affect most if not all aspects of living apart from employment, and, that minor finger and hand injuries thus do not meet the threshold.

Cases decided under *Cassidy* and extant at the time *DiFranco* was rendered, which should have elevated precedential value with the adoption of 1995 P.A. 222, support the conclusion that plaintiff does not meet the tort threshold. See *Braden v Lee,* 133 Mich App 215; 348 NW2d 63 (1984) (injuries to hand, along with injuries to back, ligaments, and other soft tissues, with return to work after four months, held not to meet tort threshold); *Ulery v Coy,* 153 Mich App 551; 396 NW2d 480 (1986) (shoulder injury with resulting loss of grip strength in an arm and hand did not meet tort threshold notwithstanding that surgery would be needed to correct the injury); *Williams v Payne,* 131 Mich App 403, 409; 346 NW2d 564 (1984) (injury to base of right thumb, not fractured but with sprained ligament and tendonitis, with resulting difficulty in performing household chores, held not a serious impairment).

With the guidance from this Court's decisions, Court of Appeals decisions on similar injuries decided under the *Cassidy* test, and the Legislative response to *DiFranco,* plaintiff Straub's finger injuries present neither an important body function nor a correlating effect on his general ability to lead his normal life. An injury to the little

finger was cited in *Cassidy* as the polar antithesis of an impairment of an important body function. No extensive medical treatment was required for plaintiff. He was not bedridden. He was not confined to a wheelchair nor lacked an ability to walk. He can perform common day-to-day activities, and did so after the accident, albeit with some difficulty. He last received treatment on November 2, 1999, about six weeks after the accident. He could and did eventually return to work, and long before 3 years. He returned to half-time work about two months after the accident, in the third week of November 1999. He last saw the doctor for a follow up check on November 23, 1999, at which time he was cleared to return to work full time without restrictions effective December 14, 1999, and he missed no further work due to this injury. He no doubt experienced inconvenient temporary limitations on his avocations and activities due to the injury and treatment of his hand. But this was short-lived. He admitted there were no activities that he had previously engaged in but could no longer do because of his injury. He did all of his household and yard work, which included caring for a 2-acre yard. He testified that he planned to remodel his kitchen and his shop, and to do the work himself. Plaintiff's impairment is not serious under the general ability to lead a normal life test set forth in *Cassidy,* its progeny synthesized in *DiFranco*, and legislatively adopted in 1995 P.A. 222.

CONCLUSION

For all of the above reasons, defendants respectfully request the Court to reverse the decision of the Court of Appeals on remand and reinstate the trial court's order granting summary disposition in favor of defendants based on the absence of a serious impairment of body function.

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.

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